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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 317

ELISABETH WENNING GOEPP, Individually and as Administratrix of the goods, chattels and credits of Rudolph Maximilian Goepp, Jr., deceased,

Petitioner,

—against—

AMERICAN OVERSEAS AIRLINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE COURT PRESS, N. Y. C.

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Statement

Petitioner, plaintiff below, seeks a writ of certiorari to review a judgment entered upon a decision of the Court of Appeals of the State of New York, affirming a judgment entered upon a decision of the Appellate Division, First Department, which reduced to $8,300 a verdict rendered by a jury in the New York Supreme Court in petitioner's favor in the sum of $65,000. The action resulted from the death of petitioner's intestate, who was a passenger on one of defendant's DC-4 aircraft which crashed into the top of a hill shortly after taking off from Harmon Field, a U. S. Army Air Force base at Stephenville, Newfoundland on October 3, 1946. The decision of the Trial

Court denying defendant's motion to set aside the verdict is not officially reported, but appears in the record (R. 692-3). The opinion of the Appellate Division, modifying on the facts and law and reducing the judgment entered on the jury's verdict is printed in the record (R. 771-81) and is reported in 281 App. Div. 105. The judgment entered upon the Appellate Division's decision was unanimously affirmed without opinion by the New York Court of Appeals, 305 N. Y. 830.

The decedent was en route from New York, N. Y. to Frankfort, Germany, via Gander, Newfoundland and Shannon, Ireland. The flight departed from La Guardia Airport, New York, on October 2, 1946, but was unable to land at Gander due to foul weather conditions, and therefore landed at an alternate airport for Gander, known as Harmon Field at Stephenville, Newfoundland, approximately 167 miles from Gander. Following a take-off the next morning while it was still dark, at a distance of 7.1 miles from the runway, the plane crashed against a 1200 foot hill at the 1160 foot mark.

It was stipulated before and at the trial that the transportation upon which decedent lost his life was international transportation by air within the terms of the Warsaw Convention (49 Stat. 3000) and that the Convention was by its terms applicable to this action (R. 58). The Convention provides that the carrier shall be liable for death or injury of a passenger during such transportation unless the carrier proves that it took all necessary measures to avoid the damage (Articles 17, 20). Article 22, however, limits the carrier's liability to 125,000 gold francs (approximately $8300) per passenger unless, as provided in Article 25, "the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

The sole ground relied upon by plaintiff as a basis for a finding of wilful misconduct, and the only question submitted to the jury by the Court as a basis for a finding of wilful misconduct, was whether defendant violated a civil air regulation, promulgated by the Civil Aeronautics Board, in the manner in which it qualified Captain Westerfield, the pilot of the plane involved in the accident, as a first pilot in its employ (R. 674, 678, 687-8). This regulation was known as Section 41.3020 in 1946. It has since been renumbered (Section 41.50), amended and clarified by the Board.

At the conclusion of all the evidence, defendant moved to dismiss the complaint in so far as a recovery was sought in excess of $8300 and for the direction of a verdict in plaintiff's favor in that amount, as the limit of defendant's liability under Article 22 of the Convention, upon the grounds (a) that plaintiff had failed to prove that the accident was caused by wilful misconduct on the part of defendant or its agents within the meaning of Article 25 of the Convention, (b) that there was a complete failure of proof of the violation of any regulation, and (c) that there was not a scintilla of evidence to establish that the alleged violation was the proximate cause of the accident. The Trial Court reserved decision on this motion and submitted the case to the jury (R. 656-62).

The jury returned a verdict in favor of the plaintiff in the amount of $65,000, by a vote of ten to two (R. 689). Thereupon defendant moved to set aside the verdict for all amounts in excess of $8300 and for the direction of a verdict in plaintiff's favor in the sum of $8300 (R. 689-90). The nature of the jury's verdict was indicated by Mr. Justice Botein, the Trial Judge, in his remarks after the jury had been polled (R. 690-1):

> "This is clearly, among other things, a compromise verdict even as to amount. It is a very unsatisfactory verdict from many aspects.
>
> * * * *

> * * * I cannot see how any jury could find that the violation which they evidently found could possibly be the proximate cause of this accident.
>
> * * * *
>
> I fail to see, frankly, how twelve men could arrive at that verdict * * *."

However, he denied defendant's motion some two months later (R. 692-3).

Section 41.3020 (R. 703-4) sets forth the "Requirements for pilot route qualification". Subparagraph (a) of the section provides the general requirements for a pilot who has served as a first pilot for less than 1,000 hours. Since Captain Westerfield had admittedly served as a first pilot for more than 1,000 hours, this paragraph had no application.

The Appellate Division, in reducing the verdict to $8300, held that Section 41.3020 (c) had not been violated. Treating the claimed violations of subparagraphs (b) and (c) of that section separately, the Court held:

1. Insofar as subparagraph (b) was concerned, "However the regulations are construed in this particular, it is abundantly clear that any failure to make two flights to Gander bore no proximate causal relation to an accident which occurred 167 miles away" (R. 776; 281 App. Div., at p. 110).

2. Insofar as subparagraph (c) was concerned, there was no violation, since the evidence was undisputed that Stephenville was "used only as an alternate" and therefore all that was required for qualification was that Westerfield "should have demonstrated his ability to land and take off at Stephenville to the satisfaction of the Administrator. This he had amply done * * *" (R. 778; 281 App. Div., at p. 110).

3. The Court also held that if either of the subparagraphs had been violated, there was no evidence to indicate that the interpretation of the regulations

upon which the defendant had acted was arrived at in bad faith, or with knowledge that it was incorrect, or in disregard of the possible consequences of an erroneous interpretation. Therefore, there was no evidence to justify a finding of wilful misconduct (R. 778; 281 App. Div., at p. 111).

Argument

In opposing the present petition for certiorari, respondent respectfully urges the following points:

1. This Court has heretofore declined to review similar final judgments in actions for wrongful death limiting the amount of recovery under the Warsaw Convention.

2. No conflict of decisions and no important question of federal law is involved.

3. In any event the decisions of the Appellate Division and the Court of Appeals in modifying the judgment entered by the lower court on the jury's verdict were clearly correct.

POINT I

This Court has heretofore declined to review similar final judgments in actions for wrongful death limiting the amount of recovery under the Warsaw Convention.

In prior cases presented to it, this Court has declined to review final judgments limiting recoveries under the Warsaw Convention, where the pleadings or proof failed to establish wilful misconduct.

Wyman v. *Pan American Airways, Inc.*, 181 Misc. 963, 267 App. Div. 947, 293 N. Y. 878, cert. den. 324 U. S. 882;

Garcia v. *Pan American Airways, Inc.*, 269 App. Div. 287, affd. 295 N. Y. 852, cert. den. 338 U. S. 824; *Lee* v. *Pan American Airways, Inc.*, 275 App. Div. 855, leave to appeal to Court of Appeals den. 275 App. Div. 962 and 300 N. Y. 761, cert. den. 339 U. S. 920.

The *Wyman* case, *supra*, is precisely in point. In that case, petitioners were the executors of a passenger en route from San Francisco to Hong Kong on the aircraft "Hawaii Clipper", who lost his life when the aircraft disappeared in flight between Guam and Manila, P. I. The case was tried before Mr. Justice Schreiber and a jury in the New York Supreme Court. At the conclusion of the trial, on defendant's motion, the Court directed judgment for plaintiffs in the sum of $8300. The Trial Court subsequently denied plaintiff's motion to set aside the verdict as inadequate, declaring (181 Misc., at p. 965):

> "The Warsaw Convention rules are applicable only to international flights (art. 1) and raise a presumption of liability on the part of the carrier for injury or death to a passenger (arts. 17, 20) limited to 125,000 francs or approximately $8,300 under the rate of exchange fixed (art. 22) except where the carrier is guilty of 'wilful misconduct' (art. 25).
>
> There was no proof in this case of 'wilful misconduct' on the part of defendants (*Wass* v. *Stephens*, 128 N. Y. 123; *Brown* v. *Garey*, 267 N. Y. 167), and, indeed, no proof of any negligence connected with, or as a proximate cause of, the accident. (*Kilinowski* v. *Ryerson & Son, Inc.*, 242 App. Div. 43, affd. 270 N. Y. 532.) Nor, in view of the circumstances, were defendants able to offer any proof in rebuttal of the presumption of liability (art. 20).
>
> The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention which here operate to permit a recovery that otherwise might be impossible for want of proof. On these considerations, at the conclusion of the trial, a verdict was directed for plaintiffs in the sum of $8,300, in accordance with the rules stated."

This decision was unanimously affirmed without opinion, by the Appellate Division, First Department, 267 App. Div. 947, and by the Court of Appeals, 293 N. Y. 878. This Court denied certiorari, 324 U. S. 882.

In *Garcia* v. *Pan American Airways, Inc., supra,* plaintiffs' decedent was a passenger who lost his life in an accident involving a "Yankee Clipper" aircraft near Lisbon, Portugal, on February 22, 1943. The complaint did not allege that the accident was caused by wilful misconduct or allege facts amounting thereto. Defendant's defenses, pleading the Convention, were substantially identical to the defenses pleaded in the case at bar. The plaintiffs moved to dismiss these defenses on the ground, *inter alia,* that the Warsaw Convention was unconstitutional. Mr. Justice Coyne, sitting in Special Term of the Supreme Court, Westchester County, denied the motion and expressly upheld the constitutionality of the Convention. Both the Appellate Division and the Court of Appeals unanimously affirmed and this Court denied certiorari, 329 U. S. 741. Subsequently, defendant moved for summary judgment in favor of plaintiffs and limiting plaintiffs' claim to $8300. This motion was granted by the Supreme Court, Westchester County, and the Appellate Division, Second Department, affirmed (269 App. Div. 287). The Court of Appeals denied leave to appeal (295 N. Y. 852) and this Court denied certiorari, 338 U. S. 824.

In *Lee* v. *Pan American Airways, Inc., supra,* plaintiff's decedent was also a passenger on the "Yankee Clipper" involved in the Lisbon accident on February 22, 1943, and he too lost his life in the accident. As in the *Garcia* case, plaintiff did not allege that the accident was caused by wilful misconduct on the part of defendant. The defendant's answer, pleading the Convention, contained defenses substantially similar to those pleaded in the *Garcia* case and in the case at bar. The plaintiff moved to strike out these defenses on the ground that they were insufficient in law. This motion was denied by the Supreme Court, West-

chester County, by order entered on July 14, 1947. Subsequently, defendant moved for an order granting judgment on the pleadings, striking out so much of plaintiff's claim for damages against the defendant as exceeded the sum of $8300, and the latter motion was granted by order entered on December 19, 1947. Both of the above orders and the judgment were unanimously affirmed by the Appellate Division, Second Department, 278 App. Div. 855. Plaintiff's motions for leave to appeal to the New York Court of Appeals were denied by the Appellate Division (275 App. Div. 962) and by the Court of Appeals (300 N. Y. 761) and this Court denied certiorari, 339 U. S. 920.

In the above mentioned cases the petitioners attacked the constitutionality of the Convention, claimed that it deprived them of the absolute right of trial by jury and unsuccessfully advanced other arguments for the granting of writs of certiorari similar to arguments advanced by the petitioner in the case at bar.

POINT II

No conflict of decisions and no important question of federal law is involved.

Petitioner's statement (Pet. 6) that the decision of the Court of Appeals denies petitioner the rights, privileges and immunities accorded by Article 25 of the Warsaw Convention and establishes an erroneous interpretation and application of said treaty is wholly without merit. That Article merely provides that:

> "(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

She sets forth alleged "Reasons for Granting the Writ" (Pet. 16-18). Her "reasons" numbered 1, 2 and 6 urge that a federal question is involved. Boiled down—this so-called federal question is whether or not the New York Courts were correct in holding that there is no evidence of wilful misconduct or proximate cause in the record. She disputes this and would have this Court review the entire record of 790 pages to ascertain whether this Court should grant certiorari to review the case on the merits.

With respect to petitioner's "reasons" numbered 3, 4, 5 and 7 (Pet. 16-17), it is obvious that these arguments are squarely in contravention of the very provisions of Article 25 of the Warsaw Convention upon which petitioner relies. With respect to petitioner's "reasons" numbered 8 and 9 (Pet. 17-18), suffice it to say that the record is absolutely barren of any question of federal employees compensation.

Petitioner elected to institute this action in a New York Court rather than in a United States District Court or in a Court of the State of Delaware, where she is a resident and where defendant was incorporated (R. 5). Whether the fact that the latter Courts require unanimous verdicts, whereas New York permits ten to two verdicts, influenced her decision to institute the action in New York is a matter that can best be answered by petitioner. However, the fact remains that, having obtained the benefit of the more liberal New York rule with respect to non-unanimous jury verdicts, she now attempts to attack other provisions of New York Court procedures provided for by the constitution and laws of New York State.

The questions raised by petitioner as to what constitutes a submissible case for the jury and whether the judgment of modification deprived petitioner of a jury trial have been before this Court on numerous occasions. The law on both questions is well settled.

In *Improvement Company* v. *Munson*, 14 Wall. 442, this Court, in discussing the requirements for a submissible case, said (p. 448):

> "* * * Formerly it was held that if there was what was called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

See also:

> *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573, 577-8.

In the present case, the Appellate Division, after reviewing the complete record, held that there was "no evidence" of wilful misconduct or proximate cause (R. 780). Applying this holding to the well established rule for a submissible case, it is apparent that no important federal question is raised by petitioner's first and fourth "Questions Presented" (Pet. 13, 14).

Similarly, petitioner's second and third "Questions Presented" (Pet. 14) raise no novel or important federal questions. Article 28, Section (2) of the Warsaw Convention, provides that:

> "(2) Questions of procedure shall be governed by the law of the court to which the case is submitted."

Under the provisions of Section 584 of the New York Civil Practice Act, an appellate court is authorized to reverse, affirm or modify the judgment appealed from, and render judgment thereon. Thus, where upon a motion to dismiss the complaint or to direct a verdict the

trial court errs by submitting the case to the jury, the appellate division may finally dispose of the case in the manner in which it should have been disposed of in the first instance (Civil Practice Act 457-a, 584; N. Y. State Constitution, Art. 6, sec. 8). This is precisely what was done in the case at bar.

In *Baltimore & C. Line* v. *Redman*, 295 U. S. 655, this Court followed and approved the New York State court practice outlined above, and said (660, 661):

> "This Court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law, and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant.
>
> Some of the States have statutes embodying the chief features of the common-law practice which we have described. The State of New York, in which the trial was had, has such a statute; and the trial court, in reserving its decision on the motions which presented the question of the sufficiency of the evidence, and in taking the verdict of the jury subject to its opinion on that question, conformed to that statute and the practice under it as approved by the Court of Appeals of the State.
>
> In view of the common-law practice and the related state statute, we reach the conclusion that the judgment of reversal for the error in denying the motions should embody a direction for a judgment of dismissal on the merits, and not for a new trial. Such a judgment of dismissal will be the equivalent of a judgment for the defendant on a verdict directed in its favor."

More recently, in *Galloway* v. *United States*, 319 U. S. 372, this Court, in rejecting the contention that the directed verdict practice deprived a litigant of his right to trial by jury, discussed that practice fully, and stated (at p. 392):

> "* * * The more logical conclusion, we think, and the one which both history and the previous decisions

> here support, is that the [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."

It is therefore respectfully submitted that the question of whether petitioner made a submissible case for the jury was one for determination by the New York Courts and that such determination did not deprive petitioner of a jury trial.

The answer to petitioner's first question of whether she presented a submissible case for the jury of necessity answers her second question as to whether she was deprived of a jury trial. She did not make a submissible case for the jury on the issue of wilful misconduct. The modification of the judgment by the Appellate Division was therefore correct and did not deprive petitioner of a jury trial. *Baltimore & C. Line* v. *Redman, supra.*

The disposition of this case by the Appellate Division and the Court of Appeals is in no way in conflict with the cases arising under the Federal Employers' Liability Act cited in petitioner's brief. In the present case the only possible conflict in the evidence was on the preliminary question as to whether there had been any violation of the civil air regulations. The modification of the judgment by the Appellate Division was not based upon the question of whether or not there had been a technical violation of the regulation. That Court held that even "if there were any violations of air safety regulations" there still was "no evidence" of proximate cause or wilful misconduct (R. 780). As to the essential requirements to support the verdict rendered by the jury the Appellate Division not only found no conflict in the evidence, it found "no evidence" at all.

Further analysis of the Federal Employers' Liability Act cases cited by petitioner furnishes additional reasons

why petitioner's reliance upon those cases is misplaced. Mr. Justice Douglas explained why this Court reviewed so many Federal Employers' Liability Act cases in his concurring opinion in *Wilkerson* v. *McCarthy*, 336 U. S. 53, wherein he said (pp. 68, 69):

> "* * * The liability which it [the Act] imposed was the liability for negligence. But judges had created numerous defenses—fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.'
>
> That purpose was not given a friendly reception in the courts. * * * And so it was that a goodly portion of the relief which Congress had provided employees was withheld from them.
>
> The first of these obstacles which the courts had created could be removed by Congress. In 1939 Congress did indeed move to release the employees from the burden of assumption of risk which the Court had reimposed on them. 53 Stat. 1404, 45 U. S. C. §54; *Tiller* v. *Atlantic Coast Line R. Co., supra.* The second evil was not so readily susceptible of Congressional correction under a system where liability is bottomed on negligence. Since the condition was one created by the Court and beyond effective control by Congress, it was appropriate and fitting that the Court correct it. * * *."

In holding that there was no evidence of "wilful misconduct" in the present case, the Appellate Division said (R. 778-9):

> "As to the asserted violations, even if the pertinent

> regulations were susceptible of varying interpretations, and defendant's version thereof were incorrect, there is no proof that defendant's interpretations were conceived in bad faith, that it was arrived at with any intimation that it was incorrect, or that it was arrived at, or effectuated, in a disregard of the possible consequences of an erroneous interpretation. These would be necessary elements to establish wilful misconduct. Wilful misconduct, as the trial court correctly charged, depends upon the facts of a particular case, but in order that an act may be characterized as wilful there must be on the part of the person or persons sought to be charged, a conscious intent to do or to omit doing the act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct. The burden of establishing wilful misconduct rests upon plaintiff."

Petitioner cites no New York case holding or even remotely suggesting that this construction of the term "wilful misconduct" was in error.

In *Wass* v. *Stephens,* 128 N. Y. 123, the Court of Appeals defined the word "wilfully" appearing in one of the New York penal statutes in the following language, at page 128:

> "* * * But the word 'wilfully' in the statute means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness. * * *"

In *Brown* v. *Garey,* 267 N. Y. 167, that court said (p. 170):

> "* * * A wrongful act done intentionally which necessarily causes harm and is without just cause or

excuse, constitutes a wilful and malicious injury. * * *"

Definitions by federal courts are in accord. In the case of *Pekelis* v. *Transcontinental & Western Air*, 187 F. 2d 122, cert. den. 341 U. S. 951, the Second Circuit approved the following charge on wilful misconduct in a Warsaw Convention case tried in the United States District Court for the Southern District of New York (p. 124):

> "'Now I shall try to define for you what is meant by "wilful misconduct" in this case. It does not mean that the defendant, or any of its employees, had a deliberate intention to kill Alexander H. Pekelis, or to wreck this airplane. Wilful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences of the performance of the act.
>
> Likewise, the intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission, would also be wilful misconduct. * * *'"

Substantially the same language has been used by at least two other federal courts of appeal. In *Rowe* v. *Gatke Corporation*, 126 F. 2d 61, the Court of Appeals for the Seventh Circuit, stated, at p. 66:

> "* * * 'Wilful misconduct' means a deliberate purpose not to discharge some duty necessary to safety. It implies obstinacy, stubborness, set purpose, and conduct that amounts to deliberate bad faith, quasi-criminal in its nature. * * *"

In *American Airlines* v. *Ulen*, 186 F. 2d 529, the Court of Appeals for the District of Columbia approved the following charge of the trial court in a Warsaw Convention case, at p. 533:

> "'Now, wilful misconduct is not, as I have said,

merely misconduct, but wilful misconduct. So if the carrier, or its employees or agents, wilfully performed any act with the knowledge that the performance of that act was likely to result in injury to a passenger, or performed that act with reckless and wanton disregard of its probable consequences, then that would constitute wilful misconduct; and if the result of that wilful misconduct was injury to Mrs. Ulen, then her recovery would not be limited by this sum of some eight thousand dollars.

* * * *

Now, the mere violation of those [safety rules and regulations], * * * even if intentional, would not necessarily constitute wilful misconduct, but if the violation was intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be wilful misconduct, and likewise, if it was done with a wanton and reckless disregard of the consequences.'"

It is clear from the foregoing authorities that no conflict of decisions and no important question of federal law is presented in the petition.

POINT III

In any event the decisions of the Appellate Division and the Court of Appeals in modifying the judgment entered by the lower Court on the jury's verdict were clearly correct.

The absence of wilful misconduct in the events preceding the accident; the pilot's qualifications to fly the North Atlantic route; his familiarity with Gander and Stephenville; his authority to use Stephenville as an alternate airport; and defendant's use of Stephenville solely as an alternate airport were established by uncontradicted testimony.

Captain Westerfield, while in the United States Army Air Force, was a first pilot who flew regularly across the North Atlantic, including flights into and out of Stephenville and Gander, for the Air Transport Command in 1944 (R. 380-8; Def. Ex. 1, R. 741-4). In the latter part of 1944 he was transferred to the Pacific theatre of operations where he continued to fly as a first pilot for the Air Transport Command until the early part of 1946. When Westerfield returned from the Pacific after his release from military duty, he was employed by defendant in February, 1946. In March of 1946 Captain Hostettler, one of defendant's experienced check pilots, who was also a designated check pilot for the Army and the Civil Aeronautics Administration, as well as a flight examiner, gave Westerfield a check flight across the North Atlantic route (R. 101). On this route check Hostettler specifically tested Westerfield as to his qualifications to use Stephenville as an alternate airport and he was satisfied with Westerfield's qualifications (R. 441). Hostettler testified that the procedure that he used on the qualification and route check of Westerfield in March of 1946 is the same procedure that he uses today in checking pilots over the route (R. 442). Following this route qualification trip Hostettler reported his approval of Westerfield and he was made a line captain by defendant (R. 447-8).

During this post-war period, when defendant's commercial operations were in their infancy, a large proportion of its operations were conducted under contract for the Air Transport Command of the Army Air Force and Westerfield started flying as a captain and first pilot in this contract operation on March 29, 1946 (R. 577). He made eight trans-Atlantic crossings in this capacity between April 2, 1946 and June 10, 1946 (Pl. Ex. 23, R. 718-20). On June 17th, Westerfield was transferred from defendant's contract operation to its commercial operation. He then made one trip as first officer (co-pilot) from New York to Gander, Shannon and London between June 23rd

and 26th (R. 421). On June 27th Westerfield's certification as a first pilot in defendant's commercial operation was approved by the Civil Aeronautics Administration (Pl. Ex. 22, R. 712). In the latter part of June, 1946 Hostettler gave Westerfield a route and qualifying check from Shannon, Ireland to and through the Scandinavian countries and rated him above average in almost everything (R. 456-7).

During the months of July and August, Westerfield flew numerous trips as a captain in defendant's commercial operation between Shannon and most of the cities in Northern Europe. On July 15th and 16th, he flew as a co-pilot from Shannon to Gander, on July 16th and 17th from Gander to Shannon, and on September 2nd and 3rd from Shannon to Gander and from Gander to La Guardia Field (R. 429; Pl. Ex. 23, R. 714, 16). In actual fact, therefore, he had landed and taken off from Gander three times, in defendant's employ, between June 23, 1946 and the date of the accident, in addition to his flights between Gander, Stephenville, and New York as an Air Force pilot in 1944 (Def. Ex. I, R. 741-4).

Defendant's use of Harmon Field solely as an alternate airport was emphasized in the testimony of Peter Matthews introduced into evidence by plaintiff. Matthews was a cadet at the West Point Military Academy (a senior classman) when his deposition was taken at West Point in the spring of 1951 (R. 99).

Matthews testified that he was in the Army Air Force in October, 1946. He was then serving as control tower operator at Harmon Field, Stephenville, Newfoundland (R. 100). His duties were "to control the flight of aircraft within a three mile radius of the field and to direct the ground movements of aircraft and vehicles on the surface of the field". He also directed landings and takeoffs. Harmon Field was then under the command of the

Air Transport Command of the United States Army Air Force (R. 100).

Matthews described the condition of the field, the length of the runway and his position in the control tower on the field at the time of the take-off and accident to plane NC-90904 on the morning of October 3, 1946 (R. 136-41) and testified that he had given take-off instructions to the pilot (R. 142). He originally instructed Captain Westerfield, the pilot, to take-off on runway 30 but as the pilot was taxiing out he changed these instructions because of a temporary wind shift and instructed him to use runway 7 (R. 151).

On cross-examination, Matthews testified unequivocally that the commercial airlines, including the defendant, only used Harmon Field as an alternate airport when the regular refueling stop at Gander was unsuitable for landing due to weather conditions (R. 146-7).

Thomas Van Sciever, another witness, testified that in 1946 he was flight superintendent for defendant. He identified Plaintiff's Exhibit 18 (R. 700) as the flight clearance which covered Westerfield's flight from New York on the morning of October 2, 1946. He pointed out that Gander was the refueling stop specified in the clearance and that Harmon Field was designated therein as an alternate. This clearance was signed by flight dispatcher Theis and by Westerfield (R. 594-6).

Plaintiff, upon whom the burden of proof as to violation of the civil air regulations, wilful misconduct and proximate cause rested, offered no testimony contrary to any of this undisputed evidence. Since plaintiff's entire case rested upon defendant's alleged violation of the regulations and the evidence not only failed to indicate any such violation, but on the contrary established that

the regulations had been complied with, it is clear that the decisions of the Appellate Division and the Court of Appeals were correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 317.

ELISABETH WENNING GOEPP, Individually and as Administratrix of the goods, chattels and credits of RUDOLPH MAXIMILIAN GOEPP, Deceased,

Petitioner,

against

AMERICAN OVERSEAS AIRLINES, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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I.

Contrary to Respondent's contention in Point I of its Brief in Opposition (p. 5) this Court has never declined to review a judgment involving the issues which are presented in this case. It has never been asked to do so. The cases cited by Respondent do not sustain its contention. Those cases are: *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, 267 App. Div. 947, 293 N. Y. 878, cert. den. 324 U. S. 882; *Garcia* v. *Pan American Airways, Inc.*, 269 App. Div. 287, affd. 295 N. Y. 852, cert. den. 338 U. S. 824; *Lee* v. *Pan American Airways, Inc.*, 275 App. Div. 855, leave to appeal to Court of Appeals den. 275 App. Div. 962 and 300 N. Y. 761, cert. den. 339 U. S. 920.

In the *Wyman* case the aircraft was lost without trace over the south Pacific Ocean. No question as to the sufficiency of the evidence to sustain a jury's finding on any issue was involved. Because of the circumstances of the accident there was no proof available to either party. The trial court held the case "to be within the very situation embraced by the rules of the Warsaw Convention which here operate to permit a recovery that otherwise might be impossible for want of proof" (181 Misc. 965), and directed a verdict for the plaintiffs in the sum of $8,300. This Court was asked to pass upon the issue as to whether or not the flight was an international flight to which the treaty applied.

The *Garcia* and *Lee* cases arose out of the same accident and presented the same issues. In each case the plaintiff relied upon the law of Portugal and a claim of negligence. In neither case was any issue as to wilful misconduct raised. Neither case went to trial. No evidence was offered. Judgments were entered on the pleadings on defendant's motion in plaintiff's favor in each instance for $8,300. In both cases this Court was asked to pass on the validity of the Warsaw Convention and its applicability to the flight in question.

II.

The importance of the Federal question involved is obvious.

We respectfully submit that the question of whether uncontradicted evidence of a complete disregard, by an air carrier, of the CAB regulations for the route qualification of pilots, and the unauthorized substitution therefor by the carrier of its own definition of a route and its own standards of route qualification is sufficient to support a jury finding of wilful misconduct under the Warsaw Convention, is an important Federal question.

III.

Respondent's conclusion to Point III of its Brief in Opposition (pp. 19-20), that the evidence established that the regulations had been complied with, finds no vestige of support in the recital of evidence which precedes it.

In such recital there is to be found no pretense of a claim that the pilot had made, within the twelve months preceding his qualification two one-way trips over the route as pilot without passengers or as co-pilot with or without passengers; that he had made one of such trips within the sixty days preceding the pilot's qualification in the company of a check pilot or that he had performed in flight, under actual or simulated instrument conditions, all of the approved instrument approach procedures at Stephenville (which had been approved as a refueling airport) as required by Part 41 of the Civil Air Regulations (Brief in Support of Petition, pp. 6-8). The evidence which established these violations was not contradicted.

The evidence which Respondent reviews in its Brief in Opposition is a rehash of its efforts to establish a fantastic and fictitious "North Atlantic Route", as distinguished from the specific route from New York to Gander (approved by the Civil Aeronautics Administration on Respondent's application) and its efforts to substitute the pilot's general experience as a standard of qualification in lieu of the specific experience specified by the CAB. This was the evidence of the Respondent adduced in an effort to evade its responsibilities under the regulations which was rejected by the jury. It was in that connection that Mr. Justice Breitel, dissenting in the Appellate Division, wrote:

> "I dissent on the ground that the issues of fact were properly determined by the jury. The meaning and effect of the regulations was a mixed question of

> fact and law because of the usages and practices involved. Moreover, both sides tried the case on that theory, and there was no exception to the court's charge in submitting those issues to the jury. The jury could properly find that defendant's acts and omissions were 'wilful misconduct' within the meaning of the Warsaw Convention, it being sufficient that they find that defendant's acts or omissions were deliberately done or omitted as acts or omissions in violation of the regulated standards of care" (pp. 782-783).

In the same category is Respondent's claim that Harmon Field (Stephenville) having been used solely as an alternate airport the pilot was not required to perform all of the required instrument approach procedures at that airport but could qualify "by other means approved by the Administrator". This, in the face of the undisputed fact that Respondent failed to establish that any other means of qualification had been approved by the Administrator, and the explicit provision of the regulations requiring performance of approved instrument approach procedures at each refueling airport approved for the route, which was the undisputed status of the Stephenville Airport (Brief in Support of Petition, p. 7).

IV.

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 7, 1953.